Before the Federal Communications Commission, Washington, D.C. 20554

In the Matter of	**)**	**MM Docket No. 99-25**
	)	**RM-9208**
Creation of a Low	**)**	**RM-9242**
Power Radio Service	**)**	

Comments of Solveig Singleton
Director of Information Studies
Cato Institute

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Founded in 1977, the Cato Institute is a public policy research foundation dedicated to considering policy options consistent with the traditional American principles of limited government, individual liberty, and peace. The Institute is a nonprofit educational foundation. Solveig Singleton, a telecommunications lawyer, is the director of information studies at the Cato Institute.

Part I of these comments concerns the Commission's proposed approach to creating a low power radio service. Part II describes alternative approaches to the problems of low power radio, including a forbearance model and an entry barrier model.

The approach to low power radio reflected in the FCC's Notice of Proposed skirts the hard issue of current "pirates." Low power radio does not need to be "created"--it exists. A new framework for low power radio should not be a pretext for squeezing out those already providing the diverse services praised in the NPRM.

The NPRM is also disturbingly ambitious in its regulatory agenda. The proposed top-down approach will run headlong into the cultural realities of microradio and the communities it serves.

Thus these comments support an inquiry into approaches to low-power that better accommodate existing low power operators and do not overburden the FCC's enforcement apparatus. The FCC should consider whether it has the authority to forbear from bringing enforcement actions against low power operators that do not cause interference problems. Second, the FCC should consider the current wattage limitations as an entry barrier. The FCC must also consider its power to adopt such alternative models (current statutory forbearance and entry barriers models apply to telecommunications services, not to broadcasters).

Part I: "Creating" Low Power Radio

The "Creation of a Low Power Radio Service" NPRM appears to support the "creation" of a service that already exists here and in other countries, and which legally existed before the FCC ceased granting Class D licenses around 1980. The NPRM's tendency to skirt around this reality leads to several problems. Without a serious inquiry into the nature of current low-power radio operations here and in other countries, or the experience with Class D licenses before 1980, the FCC will be missing valuable practical information.

The NPRM barely mentions existing low-power broadcasters, aside from implying that anyone operating as a "pirate" after being ordered by the Commission to stop would lack the "character" to become a licensee under the new system.[1] Together with the proposal to license 1000-Watt stations as a primary service and give less favored status to those of lesser power (that is, existing microradio outlets), this suggests that the FCC's plan would simply supply a pretext for wiping out existing operators. Ironically, the existing pirates are already providing precisely the kind of diversity that the proposal is intended to support.

A crack-down on existing operators raises troubling free speech issues. The illegal radio operators' role is eerily analogous to the Puritans' under King Henry VIII's system for licensing the press (the Puritans moved a secret press around England to

[1] There is some irony in the FCC's proposing that microradio operators that persist in operating unlicensed facilities would therefore be barred from seeking a low-power license. While these broadcasters are breaking the law, the FCC itself breaks the law on occasion. See *AT&T* v. *FCC*, 978 F.2d 727 (D.C. Cir, 1992); *Bechtel* v. *FCC*, 10 F.3d 875, 878 (D.C. Cir. 1994). It would be unheard of for any responsible FCC official to consider stepping down because it was found they had acted illegally. Perhaps, especially where the First Amendment is concerned experiments in "legality" are likely to go on from time to time. In the spirit of that Amendment, there ought not to be barriers to those who have broken a licensing law but who would like to continue to speak on a legal basis.

produce religious tracts from 1588 to 1589).[2] Some courts have rejected pirates' first amendment arguments. The FCC will find little comfort in this. Many pirates are local celebrities. The public is unlikely to take kindly to more SWAT teams training machine guns on radio operators, their families and pets. Rather than asking whether to deign to permit the more stubborn current operators to continue, the NPRM might question the wisdom of broadly exercising the FCC's authority to stop them, especially when their operation has resulted in no actual injury, and especially by such brutal means.

Also, the NPRM suggests few exemptions for low-power operators from existing regulations, including political broadcasting rules, time limits, character review, and new consolidation limits (stricter than those authorized by statute), new restrictions on the power to trade and transfer licenses, and presumably indecency rules as well. Enforcement of those new rules against dozens of new 10 or 100 watt micro-stations would overtax the FCC's existing regulatory apparatus, and create entry barriers where the object is to lower them.

Low-power radio, partly because it has been illegal, but *partly by its very nature* (as before it was made illegal), has best served isolated, dissident, unique, or minority communities. The voices heard over low-power radio will not always be those of polite churches, elementary schools, and traffic reporters. Low-power radio is often anti-authoritarian, anti-majoritarian, controversial. It is amateur--not legalistic. It is not mainstream.

Many of those with experience in low-power radio would comply with a top-down regulatory model only if dragged to it kicking and screaming. If the FCC's model won't

[2] Jonathan W. Emord, Freedom, Technology and the First Amendment (San Francisco, California:

accommodate true diversity, illegal stations will continue to spring up. Unless the FCC's plans for low-power radio embrace the uncouth, the amateur, and the bizarre along with the gentle, *as well as* the implications of low-cost technology, the FCC is doomed to send out more SWAT teams--and end up with more bland radio. The enforcers will win some battles, but lose the war. This is no longer a top-down world.

Part II: Alternative Approaches to Low Power Radio

From a policy standpoint, the FCC's best path to low-power radio is a bottom-up approach that recognizes economic, cultural and technological forces for what they are. Such options include forbearing (if permitted by statute) from bringing enforcement actions in certain circumstances, and/or assessing the authorization of low power radio was an entry barrier issue.

A. Forbearance

The FCC's practice with respect to low-power stations seems to be to bring enforcement actions only sometimes, such as when there are actual (or strongly alleged) problems with interference. A large number of unlicensed stations operate unmolested. The easiest approach to "authorizing" low-power radio is to clarify this policy and make it more concrete.

Does the FCC have the authority to do this? On one hand, this restraint would be less ambitious than its current NPRM. The provisions describing the FCC's enforcement powers do not *require* it to bring an action. But whether the FCC's authority under Section 157 could include the authority to make official an existing and legal policy of

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Pacific Research Institute for Public Policy, 1991) p. 27.

prosecutorial discretion is unlikely. Following the U.S. Court of Appeals decision in *AT&T* v. *FCC*,[3] which ruled that (before the 1996 Act) the FCC lacked the authority to forbear from requiring non-dominant carriers to file tariffs, the FCC never-the-less announced that it would not reject or inititate prosecutions against tariff filings that did not conform in technical respects with the FCC's rules.[4] This held only in the short run, however, as the Commision next proposed amending its rules to still require streamlined tariffing for nondominants.[5]

In addition, Congress might consider giving the FCC more explicit forbearance authority for broadcasters (existing forbearance rules apply only to telecommunications services). In a world where broadcasters of low and high power increasingly compete with and commingle with other media such as the Internet, the relevance of a substantial part of current broadcast regulation (such as ownership rules, political broadcasting rules, public interest requirements) is thrown into doubt.

B. Entry Barriers

A supplemental approach to authorizing low power radio is to view wattage restrictions as entry barriers. The key to such an approach would be to lower entry barriers--without creating new ones.

Claims of interference (general or specific) bear close examination as entry barriers. Such claims may be merely a pretext for closing down competition. In the 1920s, dominant broadcasters exaggerated problems of interference in order to squeeze

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[3] 978 F.2d 727 (1992).
[4] *Public Notice*, FCC 93-51 (Jan. 27, 1993).
[5] Tariff Filing Requirements for Nondominant Common Carriers, Notice of Proposed Rulemaking, CC Docket No. 93-26 (1993).

out smaller competitors; the claim that licensing was required to halt "chaos" is a myth.[6] There is evidence that claims of "interference" by pirate broadcasters today have similarly become a pretext for closing out competition.[7] Obviously, it is not the function of the FCC to permit its regulatory apparatus to be manipulated in this way.

Note again that the FCC's authority to approach this issue as an "entry barrier" or as an opportunity for "forbearance" must come from its authority under Section 157. The Telecommunication's Act's explicit "forbearance" and "entry barrier" provisions are for telecommunications services, not broadcasters. These comments do not address this issue of authority. On the surface, however, it would be rather unlikely that Section 157 could be interpreted so broadly.

[6] Thomas W. Hazlett, "The Rationality of U.S. Regulation of the Broadcast Spectrum," 33 *J. Law & Econ.* 133 (April, 1990).

[7] Jesse Walker, "Don't Touch That Dial: U.S. v. Stephen Paul Dunifer," *Reason,* October, 1995, p. 30.